



In the Supreme Court of the United States
OCTOBER TERM, 1979

No. **79-557**

TOWN & COUNTRY ESTATES, INC.,
Petitioner,

vs.

LI REN FONG,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion delivered in the Court below is not as yet officially reported, but is appended to the Petition for a Writ of Certiorari. The opinion was delivered on June 19, 1979, Opinion No. 79-1010, Motion for Rehearing and Rehearing En Banc denied on July 10, 1979.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

The Petitioner sets forth the question as follows:

"Whether the United States Court of Appeals for the Eighth Circuit has so far departed from applicable Missouri law, relating to the appropriate measure of damage in a misrepresentation action, as to require an exercise of this Court's supervisory powers."

CONSTITUTIONAL PROVISIONS INVOLVED

This action involves no constitutional questions.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

ARGUMENT

It is manifest that the question on which Petitioner pins its hopes is so unsubstantial as not to require extensive argument.

Petitioner raises the unusually remote question as to whether or not the United States Court of Appeals for the Eighth Circuit has departed from an alleged Missouri rule of damages as to require this Court to exercise its supervisory powers.

Petitioner complains that the Appellate Court has applied a measure of damage rule applicable in equitable situations to a law action for money damages. But, such contention is answered by reference to the opinion of the

Eighth Circuit as set forth in Key Note (6) at A-10 of the Appendix. There, the Appellate Court held:

"However, as can be seen from Fong's complaint, he initially sought rescission simultaneously with his request for out-of-pocket damages. It *was because of the peculiar events in the case*, namely, the new owners of the shopping center released Fong from his lease after his complaint had been filed and before trial commenced, that it was no longer necessary for Fong to seek rescission by the time trial began. This failure to seek rescission simultaneously with a request for out-of-pocket damages does not negate the propriety of the out-of-pocket damage award in this case. The *sine qua non* of whether out-of-pocket damages rather than benefit-of-the-bargain damages should be awarded is whether the defrauded party retains the property at issue. Here Fong no longer retains the property; therefore, out-of-pocket damages are appropriate." (Emphasis supplied)

Accordingly, this was a result achieved by the "peculiar events in this case * * *."

Every argument presented by Petitioner was orally made to the Appellate Court and set forth in Petitioner's original brief, reply brief and its Motion for Rehearing. Petitioner makes no suggestion that the Eighth Circuit overlooked any salient fact.

Since no Federal questions are involved, Petitioner's exercised rhetoric does not justify consideration by this tribunal of this routine controversy which was determined below by the "peculiar events in this case."

CONCLUSION

The arguments urged by Petitioner were not of sufficient moment to justify the United States Court of Appeals for the Eighth Circuit to order a rehearing or a rehearing en banc. They are no more substantial when addressed to this Court.

For the reasons stated, Respondent says that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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